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In the Supreme Court of the United States

OCTOBER TERM, 1984

RONALD MANNING, COMMISSIONER OF THE DEPARTMENT OF HUMAN RESOURCES OF CONNECTICUT, PETITIONER

v.

ELINOR NELSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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1. This suit involves the so-called "tax refund intercept" program. Under this program, federal tax refunds due to persons who have failed to make child support payments, the rights to which have been assigned to a state that has provided aid to those persons to whom the support is due, are "intercepted" by the IRS on the state's behalf and remitted to the state.[1] In this manner, the state is reimbursed, at least in part, for the cost of providing support that the delinquent parent failed to provide.

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[1]The principal provisions comprising the interception program are Section 464 of the Social Security Act, 42 U.S.C. (Supp. V) 664, and Section 6402(c) of the Internal Revenue Code of 1954 (26 U.S.C.). Both of these provisions were enacted as part of Section 2331 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 860.

Respondents brought this action in the United States District Court for the District of Connecticut against the Secretary of the Treasury, the Secretary of Health and Human Services, and the Connecticut Commissioner of Human Resources. Respondents alleged that tax refunds due them were wrongfully withheld by the IRS so that the refunds could be reduced by the amount of child support owed to the State of Connecticut. Respondents complained that Section 464(a) of the Social Security Act, 42 U.S.C. (Supp. V) 664(a), and Section 6402(c) of the Internal Revenue Code of 1954 (26 U.S.C.), as implemented by the defendants, deprived them of their property without due process of law in that they were not given adequate notice and an opportunity for a pre-interception hearing.[2] Respondents further alleged that to the extent the refunds due them were attributable to the earned income credit (EIC) provided by Section 43 of the Internal Revenue Code, the refunds were outside the scope of the intercept program.

After rejecting various jurisdictional defenses advanced by petitioner and the federal defendants, the district court held that an amount due an individual as a result of an EIC is not an "overpayment" for purposes of Section 6402(c) of the 1954 Code. Accordingly, the court concluded that such amount may not be intercepted by the IRS. Pet. App. 45a-48a. The court of appeals, although acknowledging that the question is a close one, affirmed the district court (*id.* at 12a-16a).

2. The Secretary of the Treasury and the Secretary of Health and Human Services are respondents in this Court pursuant to Rule 19.6 of the Rules of this Court. The

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[2]The district court held that the notice given by the state was inadequate and that the state, before certifying to the IRS the delinquency of any person, must provide that person with an opportunity for a hearing (Pet. App. 27a-30a, 39a-44a). Petitioner did not challenge this aspect of the district court's decision in the court of appeals.

government did not seek this Court's review of the decision below because it is one of first impression in the courts of appeals. Nevertheless, we believe that the court of appeals' decision on the EIC issue is erroneous. As discussed below, three district courts have reached decisions contrary to that of the Second Circuit in this case,[3] and the lack of uniformity on the issue poses substantial administrative problems for the IRS in intercepting refunds pursuant to the mandate of Section 6402(c) of the 1954 Code. While the Court may deem it more appropriate to await the decisions of other circuits (see note 3, *supra*) before reviewing the EIC issue, we believe that this Court's resolution of the issue ultimately will be required.[4]

a. Section 43(a) of the Internal Revenue Code provides (in the case of eligible individuals as defined in subparagraph (c)) for a credit against tax based on a percentage of the taxpayer's earned income. The maximum credit allowable is $500. The credit is reduced proportionately to the extent the taxpayer's adjusted gross income exceeds $6,000 but is less than $10,000. No credit is allowable for individuals whose adjusted gross income exceeds $10,000 (26 U.S.C. 43(b)). The credit was intended to benefit low-income families who pay little or no income tax and to serve as an incentive for low-income people to work, thereby reducing their need for federal assistance. See S. Rep. 94-36, 94th Cong., 1st Sess. 11 (1975).

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[3]*Coughlin* v. *Regan*, 584 F. Supp. 697 (D. Me. 1984); *Rucker* v. *Secretary of the Treasury*, 555 F. Supp. 1051 (D. Colo. 1983), appeal pending, No. 83-1804 (10th Cir.); *Sorenson* v. *Secretary of the Treasury*, 557 F. Supp. 729 (W.D. Wash. 1982), appeal pending, No. 83-3694 (9th Cir.).

[4]We express no opinion on the second question presented in the petition, relating to the state's immunity from suit under the Eleventh Amendment.

Although Section 43 provides only for a credit to be applied against income tax liability, Section 6401(b) of the Code provides that if the amount of certain types of credits, including the EIC, due a taxpayer exceeds his tax liability, the amount of such excess is treated as an "overpayment." Under Section 6402(a), the IRS may credit any overpayment made by a taxpayer against any outstanding tax liability that he may have, but must, except as provided otherwise in subsection (c), refund any balance to such taxpayer. The effect of these provisions is to require the IRS to treat an EIC, to the extent it exceeds the taxpayer's outstanding tax liability, as a refundable overpayment of tax. Thus, an individual eligible for an EIC who has no tax liability for a particular year and who, consequently, has made no payment of tax, is nevertheless entitled to a cash refund of the amount of the credit to which he is entitled under Section 43.

Subsection (c) of Section 6402 provides, however, that the "amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act." The statute further directs the Secretary to remit the amount by which the overpayment is so reduced to the state to which the rights to the past-due support have been assigned.

In the case at bar, a portion of the refunds due respondents but intercepted by the IRS pursuant to Section 6402(c) is attributable to EICs authorized by Section 43. Respondents maintain, as the courts below held, that an amount due an individual as a result of an EIC is not an "overpayment" for purposes of Section 6402(c) and therefore may not be intercepted by the IRS. Relying on the references in Section 464(a) of the Social Security Act to "refunds of Federal

taxes paid," respondents contend that the term overpayment as used in Section 6402(c) refers only to an actual overpayment of tax and does not include an amount, such as the EIC, which merely is deemed to be an overpayment of tax under Section 6401(b).

In our view, there is no valid basis for the distinction respondents seek to draw between actual overpayments of tax and amounts treated as overpayments under Section 6401(b). Nothing in the legislative history of the tax refund intercept program indicates that Congress intended to recognize such a distinction. On the other hand, adoption of respondents' position, as the court below recognized (Pet. App. 14a-15a), requires that the term overpayment be given one meaning for purposes of Section 6402(a) and a different meaning for purposes of Section 6402(c). The amount of an EIC due an individual is refundable to him under Section 6402(a) only because such amount, pursuant to Section 6401(b), is deemed to be an overpayment. The amount of any overpayment to be refunded under Section 6402(a) is, however, by express cross-reference, subject to the provisions of subsection (c) which direct the IRS to reduce the amount of any overpayment to be refunded by the amount of any past-due child support.

Given this express interrelationship between subsections (a) and (c) of Section 6402, and the absence of any affirmative support in the legislative history for respondents' anomalous position, there is no sufficient basis for concluding that Congress intended the term overpayment to have one meaning as used in the former subsection and another meaning for purposes of the latter. See *Coughlin* v. *Regan*, 584 F. Supp. 697, 706-707 (D. Me. 1984); *Sorenson* v. *Secretary of the Treasury*, 557 F. Supp. 729, 733-734 (W.D. Wash. 1982), appeal pending, No. 83-3694 (9th Cir.); *Rucker* v. *Secretary of the Treasury*, 555 F. Supp. 1051,

1053 (D. Colo. 1983), appeal pending, No. 83-1804 (10th Cir.); see also *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982).

Nor, contrary to the opinion of the court below (Pet. App. 15a), does the important social policy underlying the EIC tip the scales in favor of respondents' strained construction of the statute. The tax refund intercept program involves a social policy of at least equal importance — Congress's determination to respond to the increasing failure of individuals to honor their support obligations with respect to their dependent children. See S. Rep. 93-1356, 93d Cong., 2d Sess. 44-46 (1974); S. Rep. 97-139, 97th Cong., 1st Sess. 441 (1981); Pub. L. No. 98-378, 98 Stat. 1305 *et seq.*; *Coughlin* v. *Regan*, 584 F. Supp. at 707; *Sorenson* v. *Secretary of the Treasury*, 557 F. Supp. at 734; *Rucker* v. *Secretary of the Treasury*, 555 F. Supp. at 1053.[5] It therefore should not be presumed that Congress's overriding intent was to exclude refunds attributable to EICs from the intercept program. Accordingly, the inclusive language of Section 6402(c) should be regarded as determinative of Congress's intent. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. at 570.

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[5]S. Rep. 93-1356, *supra*, relates to the Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 *et seq.* Section 101(b)(1) of the Act (88 Stat. 2358) added Section 6305 to the Internal Revenue Code of 1954. Section 6305(a) authorizes the IRS to collect delinquent child support payments in the same manner as if the support liability were a tax. The enactment of Section 6402(c) of the Code in 1981 was intended to amplify and enhance the collection procedures previously authorized under Section 6305. See S. Rep. 97-139, *supra*, at 441.

Pub. L. No. 98-378, commonly known as the Child Support Enforcement Amendments of 1984, represents Congress's latest efforts to combat the problem of nonpayment of child support obligations. This statute expands the intercept program to include all taxpayers delinquent in their child support obligations, irrespective of whether their former spouses are receiving welfare, and also provides (beginning in 1986) for the mandatory withholding from wages of past-due child support obligations.

b. The ongoing controversy regarding the question whether an amount due an individual as a result of an EIC constitutes an overpayment for purposes of Section 6402(c) poses substantial problems for the IRS in administering the intercept program. In order for the IRS to administer the program in a cost-effective manner, the interception of refunds must be automated.[6] The IRS, however, cannot maintain a fully automated system in the absence of a uniform rule as to the treatment of EIC refunds. The decision below requires the IRS to exclude that portion of any refund attributable to an EIC in carrying out the mandate of Section 6402(c). If the IRS were to program its computers so as to implement that decision on a nationwide basis, states outside the Second Circuit might well bring suit challenging the exclusion of EIC refunds from the intercept program.[7] The IRS, accordingly, has a strong interest in a uniform resolution of the EIC issue presented by petitioner.

CONCLUSION

The decision below is erroneous to the extent it holds that EIC refunds are outside the scope of the intercept program, and the decision will significantly burden the IRS's administration of the program. Because the decision is the first by a court of appeals, the Court nevertheless may deem it appropriate to await the decisions of other circuits (see note

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[6]The number of interceptions effected by the IRS is substantial and is increasing each year. We are informed by the IRS that the total annual number of interceptions (rounded to the nearest thousand) for 1982, 1983, and 1984 (through June 25, 1984) were 273,000, 340,000, and 392,000, respectively. We have been further informed that approximately 20% of these intercepted refunds involve an EIC component.

[7]The IRS estimates that, as a result of the decision below, the State of Connecticut may be required to return approximately $1,375,000 of the amount it received under the intercept program during the first three years of the program.

3, *supra*) before considering the issue. Should the Court grant the instant petition, however, the United States would participate in support of petitioner.

Respectfully submitted.

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Solicitor General

AUGUST 1984